

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

AMERIPRIDE SERVICES, INC., a
Delaware Corporation,

Plaintiff,

v.

VALLEY INDUSTRIAL SERVICES,
INC., a former California Corporation,
et al.,

Defendants.

No. 2:00-cv-113-MCE-EFB

MEMORANDUM AND ORDER

Plaintiff AmeriPride Services, Inc. ("AmeriPride") initiated this action under the Comprehensive Environmental Remediation, Contamination, and Liability Act ("CERCLA") more than sixteen years ago. After a trial, an appeal, and settlements with numerous other parties, only Texas Eastern Overseas, Inc. ("TEO") remains as a defendant. Presently before the Court are the parties' Motions for Summary Judgment. ECF Nos. 1018, 1021, 1026. For the reasons that follow, the Motions are GRANTED in part and DENIED in part.¹

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¹ AmeriPride's objections to the fact witness testimony of John Dankoff (ECF No. 1027-4 at 3:4-4:4) are GRANTED. The remainder of the parties' evidentiary objections are OVERRULED.

BACKGROUND

This action arises out of the contamination of soil and groundwater at and around an industrial laundry facility located at 7620 Wilbur Way in Sacramento, California (“the Facility”). AmeriPride owns the Facility, which was previously owned and operated for seventeen years by Valley Industrial Services, Inc. (“VIS”) as an industrial dry cleaning and laundry business. VIS used perchloroethylene (“PCE”) as a solvent in its dry cleaning operations. During its operations, VIS released PCE into the soil and groundwater.

For part of the time that VIS operated the Facility, it was a wholly owned subsidiary of Petrolane. VIS eventually merged into Defendant Texas Eastern Overseas (“TEO”), which expressly assumed VIS’s liabilities. TEO is a Delaware corporation that dissolved in 1992. It first appeared in this case on July 13, 2000, when it answered and asserted a counterclaim. In November 2009, a receiver was appointed for TEO for “the sole purpose of establishing the capacity of TEO to be sued in [this action] solely to the extent of its insurance assets” That appointment was confirmed in 2010.

In 1983, Petrolane sold the Facility, which subsequently changed ownership several times until AmeriPride became the owner. AmeriPride did not conduct dry cleaning operations at the Facility, but, during its ownership, there were additional releases of PCE-contaminated water into the soil and groundwater. The contamination at the Facility migrated onto a neighboring property owned by Huhtamaki Foodservices, Inc. (“Huhtamaki”) and contaminated wells owned by California-American Water Company (“Cal-Am”).

In 1997, AmeriPride found evidence of PCE in the soil under the Facility and reported the discovery to regulatory authorities. In 2002, the California Regional Water Quality Control Board took regulatory control over the investigation at the Facility. Since then, AmeriPride has performed investigation and remediation of the PCE in the soil and

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1 groundwater at and near the Facility under the direction of the California Regional Water
2 Quality Control Board. The cleanup is ongoing.

3 In January 2000, AmeriPride filed this action against VIS, TEO, Petrolane,
4 Chromalloy, and other parties under CERCLA and various state laws to recover costs it
5 incurred responding to the PCE contamination. TEO answered and asserted a
6 counterclaim against AmeriPride.

7 On July 9, 2002, Cal-Am filed a separate complaint against AmeriPride and TEO
8 seeking recovery of its response costs, damages, and other relief in connection with the
9 contamination of its wells. AmeriPride paid Cal-Am \$2 million to settle those claims.
10 Two years later, on July 29, 2004, Huhtamaki sued AmeriPride; AmeriPride later paid
11 Huhtamaki \$8.25 million to settle. In addition, in 2006, AmeriPride entered into
12 settlement agreements with Chromalloy and Petrolane in which AmeriPride received
13 \$500,000 and \$2.75 million, respectively.

14 Settlement attempts between TEO and AmeriPride in 2007 were ultimately
15 unsuccessful so AmeriPride pursued its cost recovery claims against TEO. In January
16 2011, AmeriPride filed a motion for summary judgment against TEO seeking an order
17 that TEO was liable to AmeriPride for its response costs, including the settlement
18 amount it paid to Cal-Am and Huhtamaki. AmeriPride also moved to dismiss TEO's
19 counterclaim for contribution.

20 On May 12, 2011, the Court granted in part AmeriPride's motion for summary
21 judgment and determined as a matter of law that: (1) TEO is a potentially responsible
22 party liable for AmeriPride's response costs under CERCLA; (2) AmeriPride paid for
23 investigation and remediation costs of \$7,750,921 through August 2010, and regulatory
24 oversight costs of \$474,730 through September 2010; and (3) AmeriPride's investigation
25 and remediation costs are necessary and consistent with the National Contingency Plan,
26 40 C.F.R. pt. 300 ("NCP"). With respect to AmeriPride's claims under CERCLA section
27 107 for amounts it paid in settlement to Cal-Am and Huhtamaki, the Court denied
28 summary judgment. Specifically, the Court found that the settlement funds were not

1 response costs recoverable under section 107 but that AmeriPride could seek to recover
2 them under section 113(f)(1). The Court also granted leave for AmeriPride to file an
3 amended complaint (which it did on May 24, 2011). In light of this ruling, the Court did
4 not address whether those settlement amounts were paid to reimburse Cal-Am and
5 Huhtamaki for necessary response costs incurred consistent with the NCP.

6 The Court also denied several of AmeriPride's other summary judgment claims.
7 Because the Court determined that triable issues of fact remained about whether
8 AmeriPride released or disposed of PCE and regarding the equitable allocation of costs
9 between the parties, the Court: (1) denied AmeriPride's summary judgment to the extent
10 it pertains to allocation of liability on AmeriPride's CERCLA claims; and (2) denied
11 AmeriPride's summary judgment of TEO's counterclaim.

12 The case proceeded to trial. The main issue remaining at trial was the equitable
13 allocation of responsibility under AmeriPride's and TEO's respective CERCLA claims.
14 The parties presented their evidence to the Court over the course of a twelve-day bench
15 trial. On April 4, 2012, the Court entered an order finding, in part, that:

16 [T]he total amount subject to equitable apportionment is
17 \$18,295,651.00, less \$3,250,000 for a total of
18 \$15,045,651.00. After including consultant fees and other
19 costs of \$446,656.84 paid for investigation and remediation at
20 the AmeriPride site since August 2010, and the \$16,604.52
paid for regulatory oversight of the AmeriPride site since
January 2011, the total amount subject to equitable
apportionment is \$15,508,912.36.

21 The Court calculated the total amount subject to equitable apportionment by
22 combining AmeriPride's investigation, remediation, and regulatory oversight costs, then
23 adding the \$10.25 million AmeriPride paid in settlement to Huhtamaki and Cal-Am.
24 From this total the Court then deducted the \$3.25 million AmeriPride received from
25 settling its claims against Chromalloy and Petrolane, in effect applying the Uniform
26 Contribution Among Tortfeasors Act's ("UCATA") pro tanto approach to equitably
27 account for these settlements.

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1 Next, the Court apportioned the total liability fifty-fifty between TEO and
2 AmeriPride, concluding that “given the facts as the Court has found them . . . the fairest
3 apportionment is to divide responsibility equally.” ECF No. 915, at 14. The Court also
4 issued a declaratory judgment that TEO is responsible for one-half of all future cleanup
5 costs. To “roughly address” the fact that AmeriPride had “borne all of [the] costs for the
6 many years since the first cleanup order,” the Court also ordered TEO to pay
7 prejudgment interest to AmeriPride “in amounts calculated in accordance with 42 U.S.C.
8 § 9607.” Because the Court found that the interest accrual date was a matter of equity
9 rather than statutory dictate, it ordered the parties to submit a stipulation as to the
10 amount of interest. The parties filed the interest stipulation on April 18, 2012, agreeing
11 on the methodology for the calculation except as to when interest should start to accrue.
12 In that regard, the parties proposed interest amounts based on their own views as to
13 when interest should commence. The Court then determined interest accrued from the
14 date the costs were first incurred by AmeriPride, rejecting TEO’s argument that such
15 interest did not begin to accrue until the date AmeriPride demanded payment of a
16 specific amount in writing.

17 On April 20, 2012, the Court issued its Order determining the issues raised at trial,
18 which included the Court’s award of interest. The Court adopted all of the undisputed
19 facts contained in its Pretrial Order, and entered judgment in accordance with the Court’s
20 order on the same day. The Court ordered TEO to pay AmeriPride \$9,974,421.95 and
21 issued a declaratory judgment that TEO is responsible for one-half of all future cleanup
22 costs.

23 That decision was appealed, and, on April 2, 2015, the Court of Appeals vacated
24 the judgment and remanded with instructions to:

- 25 1. Explain which equitable factors the Court considered in allocating the
26 \$3.25 million in settlement payments from Chromalloy and Petrolane to
27 AmeriPride, or select those factors and allocate the settlement payments in
28 accordance with those factors in the first instance;

2. Determine the extent to which AmeriPride reimbursed Huhtamaki and Cal-Am for necessary response costs incurred consistent with the NCP; and
3. Apply the interest provisions in CERCLA section 107(a) to determine when interest began to accrue on the costs paid by AmeriPride.

On September 28, 2015, the Court took its first step towards responding to the Ninth Circuit opinion's first directive by holding that the Uniform Comparative Fault Act's pro rata approach would govern the allocation of liability to the Settling Parties. ECF No. 1001. Under the pro rata approach, the Court will determine the Settling Parties' proportionate share of the liability for response costs and deduct that share from the total amount of liability to be allocated between AmeriPride and TEO, regardless of the dollar amounts of the settlements obtained by AmeriPride.

Now pending before the Court are TEO and AmeriPride's cross-motions for summary judgment. TEO's motion seeks a ruling that Petrolane, Chromalloy, and Huhtamaki are liable in part for the clean-up costs incurred by AmeriPride, that prejudgment interest could not begin to accrue until August 2010, that AmeriPride cannot show that its settlements with Huhtamaki and Cal-Am reimbursed them for necessary response costs incurred consistent with the NCP, and that AmeriPride cannot recover approximately \$780,000 in response costs that were not presented to Judge Karlton in the first trial in this case. AmeriPride's motion seeks opposite rulings on the same issues.

STANDARD

The Federal Rules of Civil Procedure provide for summary judgment when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). One of the principal purposes of Rule 56 is to dispose of factually unsupported claims or defenses. Celotex, 477 U.S. at 325.

1 Rule 56 also allows a court to grant summary judgment on part of a claim or
2 defense, known as partial summary judgment. See Fed. R. Civ. P. 56(a) (“A party may
3 move for summary judgment, identifying each claim or defense—or the part of each
4 claim or defense—on which summary judgment is sought.”); see also Allstate Ins. Co. v.
5 Madan, 889 F. Supp. 374, 378-79 (C.D. Cal. 1995). The standard that applies to a
6 motion for partial summary judgment is the same as that which applies to a motion for
7 summary judgment. See Fed. R. Civ. P. 56(a); State of Cal. ex rel. Cal. Dep’t of Toxic
8 Substances Control v. Campbell, 138 F.3d 772, 780 (9th Cir. 1998) (applying summary
9 judgment standard to motion for summary adjudication).

10 In a summary judgment motion, the moving party always bears the initial
11 responsibility of informing the court of the basis for the motion and identifying the
12 portions in the record “which it believes demonstrate the absence of a genuine issue of
13 material fact.” Celotex, 477 U.S. at 323. If the moving party meets its initial
14 responsibility, the burden then shifts to the opposing party to establish that a genuine
15 issue as to any material fact actually does exist. Matsushita Elec. Indus. Co. v. Zenith
16 Radio Corp., 475 U.S. 574, 586-87 (1986); First Nat’l Bank v. Cities Serv. Co., 391 U.S.
17 253, 288-89 (1968).

18 In attempting to establish the existence or non-existence of a genuine factual
19 dispute, the party must support its assertion by “citing to particular parts of materials in
20 the record, including depositions, documents, electronically stored information,
21 affidavits[,] or declarations . . . or other materials; or showing that the materials cited do
22 not establish the absence or presence of a genuine dispute, or that an adverse party
23 cannot produce admissible evidence to support the fact.” Fed. R. Civ. P. 56(c)(1). The
24 opposing party must demonstrate that the fact in contention is material, i.e., a fact that
25 might affect the outcome of the suit under the governing law. Anderson v. Liberty Lobby,
26 Inc., 477 U.S. 242, 248, 251-52 (1986); Owens v. Local No. 169, Assoc. of W. Pulp and
27 Paper Workers, 971 F.2d 347, 355 (9th Cir. 1987). The opposing party must also
28 demonstrate that the dispute about a material fact “is ‘genuine,’ that is, if the evidence is

such that a reasonable jury could return a verdict for the nonmoving party.” Anderson, 477 U.S. at 248. In other words, the judge needs to answer the preliminary question before the evidence is left to the jury of “not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.” Anderson, 477 U.S. at 251 (quoting Improvement Co. v. Munson, 81 U.S. 442, 448 (1871)) (emphasis in original). As the Supreme Court explained, “[w]hen the moving party has carried its burden under Rule [56(a)], its opponent must do more than simply show that there is some metaphysical doubt as to the material facts.” Matsushita, 475 U.S. at 586. Therefore, “[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no ‘genuine issue for trial.’” Id. 87.

In resolving a summary judgment motion, the evidence of the opposing party is to be believed, and all reasonable inferences that may be drawn from the facts placed before the court must be drawn in favor of the opposing party. Anderson, 477 U.S. at 255. Nevertheless, inferences are not drawn out of the air, and it is the opposing party’s obligation to produce a factual predicate from which the inference may be drawn. Richards v. Nielsen Freight Lines, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), aff’d, 810 F.2d 898 (9th Cir. 1987).

ANALYSIS

A. Liability of Petrolane, Huhtamaki, Cal-Am, and Chromalloy

One of the central issues remaining in this litigation is the liability of Petrolane, Huhtamaki, Chromalloy, and Cal-Am (the “Settlers”) for contamination at the Facility. The extent of the Settlers’ liability as determined by this Court is important because TEO’s liability to AmeriPride will be reduced by the amount of the Settlers’ liability for contamination at the facility. This places AmeriPride in a peculiar position: although it sued the Settlers under CERCLA, and extracted sizable settlements from Chromalloy

1 and Petrolane, AmeriPride now argues that the Court cannot find that they did anything
 2 to cause contamination at the Facility. AmeriPride further argues that even if the Settlers
 3 are PRPs, the Court must allocate a zero percent share of liability to them. TEO, on the
 4 other hand, seeks a ruling that while the Settlers are potentially responsible for response
 5 costs incurred by AmeriPride, any allocation of liability at summary judgment is
 6 inappropriate. Below, the Court discusses the parties' arguments as they apply to each
 7 of the Settlers.²

8 **1. Chromalloy's liability**

9 AmeriPride's motion argues that no portion of the response costs it incurred can
 10 be allocated to Chromalloy because TEO cannot establish that Chromalloy caused
 11 AmeriPride to incur any such costs. TEO counters that under CERCLA's strict liability
 12 causation test, Chromalloy caused AmeriPride to incur response costs as a matter of
 13 law. In response, AmeriPride contends that CERCLA's causation test does not apply to
 14 this inquiry, and that the Court should apply the UCFA's causation test.³

15 **a. The relevant causation standard**

16 TEO has the better argument as to the standard of causation. CERCLA does not
 17 use the but-for causation test that governs traditional tort claims. Boeing Co. v. Cascade
 18 Corp., 207 F.3d 1177, 1185 (9th Cir. 2000). In order to show that Chromalloy is liable in
 19 part for AmeriPride's response costs, TEO can meet its burden on summary judgment if:

20 it (a) identifies contaminant at its site, (b) identifies the same
 21 (or perhaps a chemically similar) contaminant at the
 22 defendant's site, and (c) provides evidence of a plausible
 23 migration pathway by which the contaminant could have
 24 traveled from the defendant's facility to the plaintiff's site. If
 the plaintiff meets this burden, the defendant must then
 proffer evidence sufficient to create a genuine issue of fact as
 to its ability to disprove causation.

25 ² As an initial matter, however, the Court rejects TEO's argument that AmeriPride should be
 26 judicially estopped from denying the Settlers' liability because of statements it made in its superseded
 27 Third Amended Complaint. Judge Karlton already rejected this argument in ruling on one of its motions in
 limine, and TEO declined to appeal that ruling. ECF No. 951. Accordingly, the law of the case doctrine
 precludes the Court from reconsidering this issue.

28 ³ AmeriPride does not dispute that Chromalloy is a "covered person" under CERCLA § 107, and
 the Court therefore GRANTS TEO's motion on that issue. ECF No. 1025 at 24:23-24.

1 Castaic Lake Water Agency v. Whittaker Corp., 272 F.Supp.2d 1053, 1066 (C.D. Cal.
2 2003).

3 AmeriPride misguidedly relies on Pentair Thermal Management, LLC v. Rowe
4 Industries, Inc. to argue that TEO must show a greater degree of causal connection
5 between Chromalloy's conduct and AmeriPride's conduct to prevail on summary
6 judgment. The Pentair order was issued after a bench trial. Pentair Thermal
7 Management, LLC v. Rowe Industries, Inc., Nos. 06-cv-7164, 10-cv-1606, 2013 WL
8 1320422 at *1 (N.D. Cal. Mar. 31, 2013). In Pentair, the defendant argued that costs
9 should be equitably allocated to two settling parties, thereby reducing the defendant's
10 share of liability. Id. at 24. The Court noted that "[a]lthough CERCLA imposes strict
11 liability for environmental contamination on any person who at the time of disposal of any
12 hazardous substance owned or operated any facility at which the hazardous substances
13 were disposed of, the conduct of [the settling parties] and the causal connection
14 between that conduct and the release of PCBs at the site will determine their percentage
15 of fault" pursuant to § 2 of the UCFA. Id. (citations and internal quotation marks
16 omitted).

17 The procedural posture of Pentair is critical to understanding why TEO has the
18 better argument regarding the causation standard that applies at this stage of the case.
19 As previously mentioned, the Pentair order issued after a bench trial. The question
20 before the Pentair court was how to equitably allocate a share of the response costs to
21 the settling parties. The issue of whether such costs could be allocated to the settling
22 parties at all must have already been decided by the court before trial under CERCLA's
23 causation standard.

24 Here, on the other hand, TEO and AmeriPride's motions on the causation issue
25 seek to answer the initial question of whether any of AmeriPride's response costs can be
26 allocated to Chromalloy at all. That initial question of liability must be decided under
27 CERCLA's causation standard as articulated in Castaic Lake, 272 F.Supp.2d at 1066.
28 The UCFA causation inquiry is triggered when the Court actually allocates Chromalloy's

1 share of response costs after trial. Accordingly, the Court must determine whether TEO
2 has met its burden of establishing that Chromalloy caused AmeriPride to incur response
3 costs under the standard of causation discussed in Castaic Lake.

4 **b. TEO has met its burden under Castaic Lake**

5 In order to establish that Chromalloy caused AmeriPride to incur response costs
6 at the Facility, TEO must show that: (1) the contaminants at issue were present at
7 Chromalloy's site; (2) those same contaminants are present at the Facility; and (3) a
8 plausible pathway exists for those contaminants to migrate from Chromalloy to the
9 Facility. Castaic Lake, 272 F. Supp. 2d at 1066. TEO easily meets this burden.

10 First, there is no dispute as to whether the contaminants at issue were present at
11 Chromalloy's facility. AmeriPride's motion admits that "TCA was widely used, and
12 potentially PCE and TCE were used, at the Chromalloy facility." ECF No. 1021-1 at
13 10:26-27. Furthermore, AmeriPride's expert, Dr. Farr, admitted at her deposition that
14 PCE and TCA were present at the Chromalloy facility. AmeriPride attempts to create a
15 disputed issue of fact by arguing that Dr. Farr indicated that it was only possible that
16 Chromalloy used PCE at its facility. ECF No. 1025-1 at ¶ 113. However, the Castaic
17 Lake test only requires TEO to establish that the contaminants at issue were present at
18 Chromalloy's facility. See Castaic Lake, 272 F. Supp. 2d at 1066 (requiring identification
19 of contaminants at the defendant's site rather than use of such contaminants).

20 Furthermore, even if TEO was required to establish that Chromalloy actually used PCE
21 at its facility, Dr. Farr admitted that the presence and location of PCE at the Chromalloy
22 facility was likely associated with a surface release at the Chromalloy facility, which in
23 turn made it likely that PCE was used at the facility. ECF No. 1018-7 at 11-13.
24 AmeriPride fails to point to any evidence in the record that would countermand Dr. Farr's
25 admission. Therefore, there is no genuine dispute of material fact that Chromalloy more
26 likely than not used TCA and PCE at its facility.

27 Second, there is no dispute that TCA and PCE are present at the Facility.
28 Dr. Farr testified that there "was TCA in some influent to the soil vapor extraction system,

1 and also it was detected in waste water samples at the [Facility].” ECF No. 1028-3 at 9.
2 The fact that TEO’s expert, Dr. Hokkanen, admitted that TCA was not detected in the
3 groundwater plume does not create a genuine dispute of material fact that TCA was
4 present at the Facility. ECF No. 1028-1 at ¶ 114.

5 Finally, there is no dispute that soil gas migration was a plausible pathway
6 through which PCE and TCA could have traveled from the Chromalloy site to the Facility.
7 Dr. Farr testified that it was possible that soil gas could travel in that direction, and only
8 stated that the data did not support that it had so traveled. *Id.* at ¶ 117. According to
9 Dr. Hokkanen, on the other hand, soil boring logs from the remedial investigation show
10 that sandy subsurface materials between the Chromalloy site and the Facility “would
11 readily transmit soil vapor” from Chromalloy to the Facility. Accordingly, TEO has met its
12 burden of establishing causation and the burden shifts to AmeriPride to “proffer evidence
13 sufficient to create a genuine issue of fact as to its ability to disprove causation.”

14 AmeriPride, however, has not even attempted to establish a genuine dispute of
15 material fact as to its ability to affirmatively disprove causation. Accordingly, TEO’s
16 motion is GRANTED on the issue of Chromalloy’s liability.

17 **2. Petrolane’s liability**

18 Petrolane owned VIS during part of the time VIS owned the Facility. VIS was one
19 of Petrolane’s many subsidiaries until 1990, when VIS merged into TEO. TEO expressly
20 assumed VIS’ liabilities. Accordingly, the parties agree that Petrolane must be
21 independently liable for contamination at the facility in order for the Court to allocate a
22 share of the total liability at issue to Petrolane directly.

23 Petrolane is liable under CERCLA if it owned or operated the Facility at the time
24 releases of PCE, TCA, and TCE occurred. 42 USC 9607(a). TEO can establish that
25 Petrolane is directly liable under CERCLA if it “manage[d], direct[ed], or conduct[ed]
26 operations specifically related to pollution, that is, operations having to do with the
27 leakage or disposal of hazardous waste, or decisions about compliance with
28 environmental regulations.” *United States v. Bestfoods*, 524 U.S. 51, 66-67 (1998).

1 Alternatively, Petrolane is derivatively liable under CERCLA section 107 if Petrolane was
 2 VIS' successor or if VIS was merely an alter ego of Petrolane. AmeriPride contends that
 3 there is no genuine dispute of material fact as to Petrolane's lack of liability under any of
 4 these three theories. TEO, on the other hand, argues that there is no dispute that
 5 Petrolane is liable under all three theories.

6 **a. Direct liability**

7 There are multiple disputes of material fact as to the question of whether
 8 Petrolane is directly liable under CERCLA. The Supreme Court's decision in Bestfoods
 9 provides that a parent corporation such as Petrolane can be directly liable as an
 10 operator under CERCLA when: (1) the parent "operates the facility in the stead of its
 11 subsidiary or alongside the subsidiary in some sort of a joint venture[;]" (2) "a dual officer
 12 or director might depart so far from the norms of parental influence exercised through
 13 dual officeholding as to serve the parent, even when ostensibly acting on behalf of the
 14 subsidiary in operating the facility[;]" or (3) "an agent of the parent with no hat to wear
 15 but the parent's hat might manage or direct activities at the facility." Bestfoods, 524 U.S.
 16 at 71.⁴

17 AmeriPride argues that TEO cannot point to any evidence that an agent of
 18 Petrolane either directed actions that resulted in contamination at the Facility or
 19 controlled operations relating to hazardous waste disposal and environmental
 20 compliance. In support of its motion, AmeriPride points only to the testimony of TEO's
 21 business history expert (Dr. Lipartito), who admitted that day-to-day operations at the
 22 Facility were left to VIS and its lower level managers, to show the absence of a genuine
 23 dispute of material fact as to Petrolane's direct liability. See ECF No. 1021-1 at 21. In
 24 doing so, AmeriPride has necessarily limited its motion for summary judgment to the first
 25 prong of the Bestfoods direct liability test. See Celotex, 477 U.S. at 323 (explaining that
 26 the moving party has the initial burden of identifying portions in the record "which it

27 ⁴ The Supreme Court's reference to "hats" alludes to the "well established principle of corporate
 28 law that directors and officers holding positions with a parent and its subsidiary can and do change hats to
 represent the two corporations separately, despite their common ownership. Bestfoods, 524 U.S. at 69.

1 believes demonstrate the absence of a genuine issue of material fact.”) Bestfoods,
2 524 U.S. at 71 (explaining that direct liability may be found where the parent corporation
3 operates the facility alongside its subsidiary).

4 The problem for AmeriPride is that it has previously alleged that Petrolane was an
5 operator of the Facility. ECF No. 103 at ¶ 47. Although that pleading was later
6 amended and the allegation withdrawn from AmeriPride’s Fourth Amended Complaint,
7 that allegation remains admissible (though not conclusive) evidence that Petrolane
8 actually operated the Facility alongside VIS. Huey v. Honeywell, 82 F.3d 327, 333 (9th
9 Cir. 1996). Although AmeriPride argues that it only made the allegation on information
10 and belief, that qualifier impacts only the weight of the allegation as evidence, not its
11 admissibility. Id. Accordingly, there is a genuine dispute of material fact as to whether
12 Petrolane is directly liable for AmeriPride’s response costs.

13 **b. Successor liability**

14 AmeriPride argues that Petrolane did not succeed to VIS’ liabilities under any of
15 the four theories by which successor liability can occur. ECF No. 1021-1 at 21-23; see
16 also United States v. Sterling Centrecorp Inc., 960 F. Supp. 2d 1025, 1034 (E.D. Cal.
17 June 24, 2013) (explaining that successor liability as a result of an asset sale only arises
18 where “unless (1) the purchasing corporation expressly or impliedly agrees to assume
19 the liability; (2) the transaction amounts to a ‘de-facto’ consolidation or merger; (3) the
20 purchasing corporation is merely a continuation of the selling corporation; or (4) the
21 transaction was fraudulently entered into in order to escape liability.”). TEO only
22 opposes AmeriPride’s argument on one ground, contending that Petrolane’s purchase of
23 VIS was a de facto merger. Accordingly, AmeriPride is entitled to summary adjudication
24 on the issue of Petrolane’s successor liability unless there a genuine dispute of material
25 fact as to whether Petrolane’s purchase of VIS was a de facto merger.⁵

26 ⁵ In its reply brief, AmeriPride argues that the de facto merger doctrine cannot apply because
27 Petrolane’s purchase of VIS was a stock purchase rather than an asset purchase. AmeriPride cannot
28 have it both ways: if the purchase was for stock rather than assets, then the test in Sterling that
AmeriPride advanced as the standard for determining whether Petrolane succeeded to VIS’ liabilities does
not apply, and summary adjudication on the issue is inappropriate. In addition, the purchase agreement

Courts typically decide whether an asset purchase constitutes a de facto merger by reference to the following four factors:

(1) There is a continuation of the enterprise of the seller corporation, so that there is continuity of management, personnel, physical location, assets, and general business operations.

(2) There is a continuity of shareholders which results from the purchasing corporation paying for the acquired assets with shares of its own stock, this stock ultimately coming to be held by the shareholders of the seller corporation so that they become a constituent part of the purchasing corporation.

(3) The seller corporation ceases its ordinary business operations, liquidates, and dissolves as soon as legally and practically possible.

(4) The purchasing corporation assumes those obligations of the seller ordinarily necessary for the uninterrupted continuation of normal business operations of the seller corporation.

Sterling, 960 F. Supp. 2d at 1042. Although none of these factors alone is necessary or sufficient to establish a de facto merger, Courts generally look to the second factor—continuity of shareholders—as the most important. Id. At bottom, however, resolving the question of whether a de facto merger has occurred is a functional, holistic, and equitable inquiry that seeks to answer a basic question: was the result of the transaction the same as what would have occurred if a statutory merger had taken place? Id.

Here, AmeriPride argues that a de facto merger could not have taken place because VIS did not dissolve as soon as “legally and practically possible[,]” and remained a subsidiary of Petrolane until 1990. Id.; ECF No. 1027 at 14.⁶ This argument, which only goes to the third factor of the Sterling test, cannot overcome the fact that three of the other factors, including the most important one, favor TEO’s position. There is no dispute that VIS’ personnel, physical location, assets, and general business operations continued unabated after the Petrolane transaction. There is no question that

between Petrolane and VIS clearly identifies itself as an asset purchase agreement. ECF No. 1021-8 at 87.

⁶ AmeriPride further argues that the “concept of continuation makes no sense here, where the context is a much larger corporation purchasing the stock of a smaller one to become a subsidiary.” ECF No. 1027 at 14-15. That argument is unsupported, nonsensical, and rejected.

Petrolane assumed VIS' obligations that were necessary for the continuation of VIS' normal business operations. See ECF No. 1021-8 at 98 ("Petrolane agrees . . . that it will assume and agree to perform and pay when due all the debts, liabilities, obligations, and contracts of Valley Subsidiary as reflected on the balance sheet of Valley Industrial on June 24, 1972, excluding those [related to Valley Industrial's previously sold plastics business]."). Finally, there is no dispute that Petrolane paid for VIS' assets with shares of Petrolane stock such that VIS' former shareholders became a constituent part of Petrolane. See Sterling, 960 F. Supp. 2d at 1042 (continuity of shareholders factor).

Other undisputed evidence in the record further confirms that Petrolane's purchase of VIS amounted to a de facto merger. For example, AmeriPride admits that Petrolane executed a promissory note in 1978 that included a covenant in which it agreed to "cause each of its subsidiaries to, comply with all applicable statutes and regulations in respect of the conduct of business, and the ownership of property, by [Petrolane] and such subsidiary, (including without limitation, applicable statutes, regulations, orders and restrictions relating to . . . environmental standards and controls. . . ." ECF No. 1027-2 at ¶ 32. AmeriPride also admits "that the VIS profit sharing plan was merged into the plan that covered Petrolane and its subsidiaries."

In light of the evidence that the Court has received and the Court's analysis of the Sterling test, there is no genuine dispute of material fact that the sale of VIS' assets to Petrolane was a de facto merger. AmeriPride's Motion is therefore DENIED as to Petrolane, and TEO's Motion is GRANTED. Petrolane is therefore potentially liable for a percentage of AmeriPride's response costs. That percentage will be equitably allocated by the Court after trial. In light of this ruling, the Court need not address the parties' alter ego arguments.

3. Huhtamaki's liability

The parties' discussion of Huhtamaki's liability on summary judgment speaks to two different concerns. TEO's Motion, which seeks to hold Huhtamaki liable for contaminating its own property, is moot in light of the Court's holding below that

1 AmeriPride cannot recover the money it expended to settle with Huhtamaki. See infra,
2 at _____. Accordingly, TEO's Motion is DENIED on the issue of Huhtamaki's liability.

3 AmeriPride's Motion, on the other hand, disputes that Huhtamaki can have liability
4 for AmeriPride's response costs. Specifically, AmeriPride argues that there is no
5 evidence in the record that Huhtamaki's release of hazardous substances at its facility
6 caused AmeriPride to incur response costs.

7 Applying the test set forth in Castaic Lake, 272 F. Supp. 2d at 1066, it is clear that
8 summary judgment is not appropriate on the issue of Huhtamaki's liability. TEO has
9 identified PCE and TCA at Huhtamaki's property, identified the same substances at the
10 Facility, and identified a plausible pathway by which such contaminants could travel from
11 Huhtamaki's property to the Facility (i.e., via soil gas). Id. AmeriPride, however, has
12 proffered evidence that is sufficient to create a genuine dispute of material fact as to its
13 ability to disprove causation. Id.; see ECF No. 1027 at 16. Accordingly, summary
14 judgment on the issue of Huhtamaki's liability is DENIED.

15 **4. Cal-Am's liability**

16 AmeriPride's argues that it is entitled to summary judgment on the issue of
17 Cal-Am's liability for contamination at the Facility because there is no evidence in the
18 record that points to conduct by Cal-Am that caused AmeriPride to incur response costs.
19 In opposing AmeriPride's Motion, TEO contends that AmeriPride's statements in other
20 pleadings that Cal-Am is liable under 42 U.S.C. § 9607 create a dispute of material fact
21 on the issue sufficient to preclude summary judgment. ECF No. 1026 at 15:14-21.

22 TEO's argument lacks merit. Rule 56 provides that "[t]he court shall grant
23 summary judgment if the movant shows that there is no genuine dispute as to any
24 material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P.
25 56(a) (emphasis added). A dispute is "genuine" if the evidence is such that a reasonable
26 jury could return a verdict" for the nonmoving party. DP-Tek, Inc. v. AT & T Global
27 Information Solutions Co., 100 F.3d 828, 831 (10th Cir. 1996); see also Bushie v.
28 Stenocord Corp., 460 F.2d 116, 119 (9th Cir. 1972) ("The showing of a genuine issue for

1 trial is predicated upon the existence of a legal theory which remains viable under the
2 asserted version of the facts, and which would entitle the party opposing the motion
3 (assuming his version to be true) to a judgment as a matter of law.” (internal quotation
4 marks omitted)).

5 TEO’s opposition to AmeriPride’s Motion points to no evidence, other than
6 statements in previous AmeriPride pleadings, that would allow a reasonable jury to find
7 that Cal-Am’s conduct caused AmeriPride to incur response costs. In the Court’s
8 estimation, no reasonable jury could find that Cal-Am caused AmeriPride to incur
9 response costs based solely on the statements proffered by TEO. Accordingly, there is
10 no genuine dispute of fact on the issue of Cal-Am’s liability and AmeriPride’s Motion is
11 GRANTED on this issue.

12 **5. Equitable allocation of costs at summary judgment**

13 AmeriPride argues that even if Petrolane and Chromalloy are deemed liable for a
14 portion of the response costs incurred at the Facility, the Court must allocate a zero
15 percent share of such liability to them without the benefit of hearing evidence at trial. As
16 this Court has explained before, it “defies logic” to shoehorn the complicated equitable
17 inquiry necessary to allocate costs to Petrolane and Chromalloy into a summary
18 judgment motion. United States v. Honeywell Intern., Inc., 542 F. Supp. 2d 1188, 1202
19 (E.D. Cal. Feb. 22, 2008). The Court requires a complete record in order to responsibly
20 exercise its discretion on the question of Petrolane and Chromalloy’s equitable shares of
21 AmeriPride’s response costs. Id. at 1203. AmeriPride may well be able to persuade the
22 Court that it should not allocate any share of the liability to Petrolane and Chromalloy.
23 Such a decision, however, must occur after a trial. Id. AmeriPride’s Motion is therefore
24 DENIED on the issue of allocation.

25 **B. Prejudgment Interest**

26 In awarding prejudgment interest to AmeriPride following the 2011 trial, the Court
27 held that interest would accrue on the date when response costs were paid by
28 AmeriPride. CERCLA provides that interest is recoverable on a claim beginning “the

1 later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date
2 of the expenditure concerned.” 42 U.S.C. § 9607(a)(4)(i). The Ninth Circuit found that
3 “the district court erred in holding that prejudgment interest began accruing on the date
4 AmeriPride incurred the relevant costs without determining whether that date was later
5 than the date on which AmeriPride demanded a specific amount in writing from TEO.”
6 ECF No. 981 at 28.

7 TEO argues that interest could not begin to accrue until August 10, 2010. TEO
8 reasons that because TEO was a defunct corporation, it did not exist for the purposes of
9 interest accrual until a receiver was appointed. The appointment of a receiver occurred
10 in June 2010. AmeriPride then demanded approximately \$15 million on August 10,
11 2010. TEO contends that interest could only have begun to accrue upon its receipt of
12 this demand.

13 AmeriPride opposes TEO’s argument in this regard, contending that nothing in
14 § 9607(a) creates an exception for a polluter’s corporate status. Instead, AmeriPride
15 argues that prejudgment interest began to accrue on January 20, 2000, when it served
16 TEO with its First Amended Complaint (FAC) and demanded all past, present, and future
17 cleanup costs incurred in connection with PCE contamination from the Facility. Although
18 the FAC did not specify an exact amount, AmeriPride cites cases from other circuits
19 holding that a complaint constitutes sufficient written demand of payment to satisfy the
20 statute’s requirement regardless of whether it demands an exact amount.

21 Neither party’s position is entirely persuasive. As AmeriPride points out, nothing
22 in § 9607 exempts a defunct corporation from receiving a specific demand that triggers
23 the accrual of prejudgment interest. Acquiescing to TEO’s argument that it could not
24 have been liable for such interest until a receiver was appointed would likely discourage
25 parties subject to a clean-up order from incurring response costs until procedural
26 technicalities are resolved, with potentially deleterious effects to public health and the
27 environment. Furthermore, such a ruling would also likely encourage knowing corporate
28 ///

1 polluters to disband and reorganize to strategically avoid significant prejudgment interest
2 costs. Neither outcome is consistent with CERCLA's purposes.

3 Furthermore, TEO's past conduct contradicts its argument that it could not have
4 had notice of AmeriPride's demand. Essentially, TEO argues that the purpose of the
5 demand requirement is notice, and that TEO could not have had notice of any demand
6 until a receiver was appointed in June 2010. TEO, however, answered the FAC, filed a
7 counterclaim against AmeriPride, and served and responded to discovery. Given its
8 ability to respond to the FAC, it clearly had actual notice of a demand.

9 On the other hand, the FAC does not substantially comply with § 9607's demand
10 requirement. The FAC made no monetary demand whatsoever. Although the Ninth
11 Circuit has not yet squarely addressed how specific a demand must be in order to satisfy
12 § 9607, AmeriPride points to four decisions that it claims stand for the proposition that a
13 "complaint constitutes sufficient written demand of payment to satisfy the requirements
14 of [§ 9607]." ECF No. 1021-1 at 28:20-21. In fact, two of those decisions dealt with
15 complaints that contained at least some estimate of the costs for which the plaintiff
16 sought reimbursement. See Bancamerica Commercial Corp. v. Mosher Steel of Kansas,
17 Inc., 100 F.3d 792, 801 (10th Cir. 1996) ("This demand of at least \$1 million in response
18 costs satisfies § 107(a)'s requirement of a written demand of a specific dollar amount.");
19 K.C. 1986 Ltd. Partnership v. Reade Mfg., 472 F.3d 1009, 1019 (8th Cir. 2007) ("Borax
20 named specific amounts in the third-party complaints and the Rule 26 disclosures" that it
21 contended satisfied the demand requirement); see also U.S. v. Consolidation Coal Co.,
22 345 F.3d 409, 416 (6th Cir. 2003) (a complaint that demanded "over \$47 million" from 59
23 third-party defendants but "did nothing to specify the amount being demanded from each
24 of [them]" did not satisfy the demand requirement because it was not sufficiently
25 specific.).

26 This Court agrees that a complaint must allege some dollar figure in order to
27 satisfy § 9607's demand requirement. In doing so, the Court is sensitive to "CERCLA's
28 holistic and substantial compliance approach to the procedural aspects of remediation,

1 and its overarching and firm policy to encourage parties to clean up environmental
2 pollution” Pentair, 2013 WL 1320422 at *27. To hold that a complaint bereft of any
3 dollar figure qualifies as a written demand for a “specified amount,” however, would
4 directly contradict explicit statutory text. 42 U.S.C. § 9607(a)(4). The Court cannot shirk
5 its duty to “give effect, if possible, to every clause and word of a statute[.]” Gade v. Nat’l
6 Solid Wastes Mgmt. Ass’n, 505 U.S. 88, 100 (1992). Accordingly, AmeriPride’s FAC
7 could not have triggered the accrual of interest, and AmeriPride’s Motion is denied on
8 the issue of prejudgment interest.

9 Although the Court has rejected TEO’s legal argument concerning a defunct
10 corporation’s need for a receiver to take delivery of a demand letter, the fact remains
11 that the 2010 demand letter is the only evidence of a written demand that could trigger
12 interest accrual. AmeriPride’s failure to point to any evidence of another qualifying
13 demand letter means that there is no genuine dispute of material fact about when
14 prejudgment interest began to accrue. Accordingly, TEO’s Motion is GRANTED on the
15 issue of prejudgment interest.

16 **C. AmeriPride’s Settlements with Cal-Am and Huhtamaki**

17 In 2002, AmeriPride settled a lawsuit brought against it by Cal-Am for \$2 million
18 resulting from PCE contamination of its wells. AmeriPride settled a similar lawsuit with
19 Huhtamaki for \$8.25 million. The Ninth Circuit held that the Court erred when it added
20 these settlements to the amount subject to equitable apportionment without determining
21 whether the money AmeriPride paid to settle Cal-Am and Huhtamaki’s claims it
22 reimbursed them for necessary response costs incurred consistent with the NCP.

23 TEO makes two arguments in support of its Motion for Summary Judgment on
24 this issue. First, TEO contends that the settlement agreements cannot be parsed to
25 distinguish between compensation for Cal-Am and Huhtamaki’s CERCLA claims and
26 non-CERCLA claims. Second, TEO argues that, based on the evidence in the record,
27 AmeriPride cannot meet its burden of showing that Cal-Am and Huhtamaki’s
28 expenditures in dealing with the PCE contamination complied with the NCP.

1 TEO's first argument is dispositive. The settlement agreements themselves make
2 no distinction whatsoever as to whether AmeriPride intended to settle Cal-Am and
3 Huhtamaki's CERCLA claims, their non-CERCLA claims, or some combination of both.
4 While the Ninth Circuit has not explicitly addressed how to construe settlement
5 agreements that resolve both CERCLA and non-CERCLA claims, the Tenth Circuit has
6 held that a settlement agreement must be interpreted against the party seeking to
7 allocate money between CERCLA recoverable and non-recoverable costs where the
8 agreement is silent on the issue. Friedland v. TIC-The Industrial Company, 566 F.3d
9 1203, 1210 (10th Cir. 2009). Furthermore, AmeriPride has stipulated that neither party
10 shall seek to admit evidence of the parties' intent in entering into those settlement
11 agreements. ECF No. 1005. If the settlement agreements are silent as to the allocation
12 of payment between Cal-Am and Huhtamaki's CERCLA and non-CERCLA claims, then
13 this Court cannot even begin to answer the question of the extent to which AmeriPride
14 reimbursed Huhtamaki and Cal-Am for necessary response costs incurred consistent
15 with the NCP.

16 AmeriPride argues that the real issue is how much money Cal-Am and Huhtamaki
17 spent on response costs rather than the parties' intent in the settlement agreement. This
18 argument lacks merit. On remand, the Ninth Circuit directed this Court to determine how
19 much of the settlements "reimbursed Huhtamaki and Cal-Am solely for necessary
20 response costs incurred consistent with the NCP." AmeriPride, 782 F.3d at 490 n.11.
21 This is qualitatively different from a determination of how much Huhtamaki and Cal-Am
22 spent on NCP-compliant response costs. Put simply, the Court cannot begin to make a
23 determination of how much Cal-Am and Huhtamaki spent on NCP-compliant response
24 costs without first determining that some portion of the settlement money paid was
25 intended to reimburse them for such costs under CERCLA. Since the settlement
26 agreements themselves are the only admissible evidence of AmeriPride's intent to
27 reimburse per the parties' stipulation, and because they say nothing about any such
28 intent, TEO's Motion is GRANTED as to this issue.

D. AmeriPride's \$782,000 in Additional Response Costs

The final issue for resolution by the Court is AmeriPride's assertion that it is entitled to recover the approximately \$780,000 in expenses incurred as it has continued to clean up the Facility. Judge Karlton previously found that AmeriPride incurred approximately \$8.5 million in necessary response costs that were consistent with the NCP. ECF Nos. 735 at 46-47, 915 at 8, 11. Judge Karlton further found that, "[t]o the extent that the court has determined that AmeriPride's existing response actions have substantially complied with the [NCP], the court determines that continuation of those actions will be similarly compliant." ECF No. 735 at 45. The parties recently stipulated that approximately \$2 million of these additional response costs are recoverable, but could not agree on the recoverability of approximately \$782,000 in costs that were incurred by AmeriPride before the Court's April 20, 2012 Order and Judgment that were not presented to the Court in the first trial. AmeriPride avers that it did not present these costs at trial due to the deadlines in Judge Karlton's scheduling order.

AmeriPride argues that it is entitled to recover the \$782,000 as further response costs pursuant to 42 USC 9613(g)(2). That statute allows a party to recover further response costs consistent with a court's declaratory judgment. TEO contends, on the other hand, that based on a case from the Western District of Washington, the \$782,000 in costs can only be recovered if such costs were "incurred after the date of declaratory judgment entered pursuant to 42 USC 9613(g)(2)" U.S. v. Washington State Dept. of Transp., 2014 WL 2860823 at *3 (W.D. Wash. June 23, 2014). AmeriPride counters that the Washington decision is distinguishable because the Ninth Circuit vacated the declaratory judgment in this case. ECF No. 1027 at 20.

Granting AmeriPride's motion on this issue would completely reopen the Court's previous declaratory judgment and effectively require the Court to start over from scratch, in contradiction to the Ninth Circuit's limited remand order requiring the Court to address three discrete questions. AmeriPride had numerous opportunities to request that the additional \$782,000 in costs be included in the declaratory judgment, but failed

1 to do so. The parties did not appeal the over \$8 million awarded as response costs, and
2 the amount awarded in Judge Karlton's declaratory judgment order is therefore final.
3 While the Ninth Circuit technically vacated that judgment, the remand order is quite
4 narrow, and addresses only the allocation of liability, not the total amount of liability at
5 issue. The court's remarks in Washington are equally applicable to this case:

6 A simplification of the foregoing events can be set out as
7 follows: Plaintiff requested response costs of \$9,343,765.00
8 for costs to certain dates. The Court asked if that was all
9 Plaintiff wanted. Plaintiff said yes. The Court gave Plaintiff all
10 it wanted. It can't ask for more now.

11 Id. at *2. Because the Court's declaratory judgment was final as to the amount of
12 AmeriPride's response costs incurred prior to the entry of judgment, AmeriPride is not
13 entitled to re-litigate this issue. Accordingly, TEO is entitled to summary judgment on
14 this issue as well.

15 CONCLUSION

16 TEO's Motion for Summary Judgment (ECF No. 1018) is GRANTED in part and
17 DENIED in part for the reasons stated above. AmeriPride's Motion for Summary
18 Judgment (ECF No. 1021) is GRANTED in part and DENIED in part for the reasons
19 stated above.

20 IT IS SO ORDERED.

21 Dated: July 12, 2016

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23 MORRISON C. ENGLAND, JR.
24 UNITED STATES DISTRICT JUDGE
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